(2)

Supreme Court, U.S.
FILED
JUL 31 1996
CLERK

No. 95-2093

In The

Supreme Court of the United States

October Term, 1995

In Re:

DONALD EDWARD HAMER,

Debtor.

BERDJ MOVSESIAN; ADRIENNE MOVSESIAN; NOUBAR MAHDESSIAN; ANN MAHDESSIAN; A&N, INC.; and BERDJ & NOUBAR CORP.;

Petitioners,

vs.

DONALD E. HAMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached Brief in Opposition to Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

The Respondent's affidavit in support of this motion is attached hereto.

OKIN, COHEN & HOLLANDER
Attorneys for Respondent
One Parker Plaza
Fort Lee, New Jersey 07024
(201) 947-7500

Bruce D. Gordon
Counsel of Record

4 pp

STATE OF NEW YORK }
} S.S:
COUNTY OF ULSTER }

I, Donald Edward Hamer being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to respond to with regard to a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit is the following:

> Whether a bankruptcy court can allow a plaintiff to file a complaint to determine dischargeablity late if the late filing was the result of excusable neglect.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

No. I am not presently employed. My last employment ended on September 15, 1993. Such prior employment was on a project/consultant basis. The average monthly wages for this position were $8,500. I am presently receiving monthly Social Security disability benefits in the sum of $1,203 which is net of monthly deduction of Medicare medical insurance premium of $43.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

No.

3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.

Yes. The total amount in account is $75.97 as of June 30, 1996.

4. Do you own any real estate, stocks, bonds notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.

Yes. I own a 1/3 interest with my wife and daughter in a two family house located at 889 Red Road, Teaneck, New Jersey (the "Property"). The Property is listed on my bankruptcy schedules as having a value of $90,000. The Property is subject to claims of creditors, including secured creditors in my bankruptcy proceeding. It is doubtful that I have any equity in the Property.

I do not own any other valuable property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I declare under the penalty of perjury that the foregoing is true and correct.

Donald E. Hamer

SUBSCRIBED AND
SWORN TO before me
this 31st day of July, 1996.

JEANNINE MAYER [redacted]
Notary Public, State of New York
Resident in and for Ulster County
Commission Expires January 12, 1997

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

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Debtor.

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Petitioners,

vs.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Where a creditor has received actual notice of the bar date to file complaints to determine dischargeability of a debt, is the bankruptcy court empowered with the discretion to allow the creditor to file a complaint in an untimely manner based upon the existence of excusable neglect?

STATUTES AND RULES

11 U.S.C. §523

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

* * *

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

* * *

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

Fed. R. Bankr. P. 4007
DETERMINATION OF DISCHARGEABILITY OF A DEBT

* * *

(c) *Time for Filing Complaint Under §523(c) in Chapter 7 Liquidation, Chapter 11 Reorganization, and Chapter 12 Family Farmer's Debt Adjustment Cases; Notice of Time Fixed.* A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Fed. R. Bankr. P. 9006
TIME

* * *

(b) *Enlargement.*

(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

* * *

(3) *Enlargement Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

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8 Lawrence P. King, et al., Collier on Bankruptcy, ¶ 4007.05[3] (15th ed. 1995) 13-14

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STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1254(1) because the critical questions presented for review in the Petition for Writ of Certiorari (the "Petition") were never presented to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). These newly presented arguments may not be properly considered. *See* p. 5 below.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The underlying action is an adversary proceeding brought within a bankruptcy case. It is a core proceeding as defined in 28 U.S.C. §157(b)(2)(I) because it directly relates to the time within which to file a complaint objecting to dischargeability of debts.

This case was commenced by Berdj Movsesian, Adrienne Movsesian, Noubar Mahdessian, Ann Mahdessian, Berdj & Noubar Corporation, and A&N, Inc., Petitioners herein ("Petitioners") filing a Complaint to determine the dischargeability of a debt due (the "Complaint") from Donald E. Hamer, Respondent herein ("Respondent"), Op. at 2a[1], on February 28, 1994, one business day after the deadline to do so (the "Adversary Proceeding") which was February 25, 1994 (the "Bar Date"). On March 29, 1994, Respondent filed a motion to dismiss the Adversary Proceeding because the Complaint was filed after the Bar Date (the "Dismissal Motion"). *Id.* On September 8, 1994 a hearing was held before the Honorable William F. Tuohey, U.S.B.J. with respect to the Dismissal Motion. At the hearing on September 8, 1994, the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") heard oral argument with respect to the Dismissal Motion and thereafter entered its opinion on the record denying the Dismissal Motion. *Id.* at 3a. Subsequently, on September 29, 1994, the Bankruptcy Court entered an Omnibus Order With Respect to the Hearing of September 8, 1994 (the "Omnibus Order") which provided for denial of the Dismissal Motion. *Id.* at 3a; *See* Petition at 18a,

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[1]For convenience, all citations to the opinion of the District Court dated April 10, 1995 and filed on April 13, 1995 (the "District Court Opinion") will be to the opinion attached hereto as Appendix A and cited to as "Op."

23a-24a.

Upon uncovering matters and controlling decisions which counsel for Respondent believed constituted cause for reconsideration of the Bankruptcy Court's decision denying the Dismissal Motion, Respondent filed a motion for reconsideration (the "Reconsideration Motion") on September 26, 1994. Op. at 3a. At the hearing on the Reconsideration Motion on November 1, 1994 the Bankruptcy Court heard oral argument and thereafter entered its opinion on the record denying the Reconsideration Motion. *Id.* Subsequently, on September 29, 1994, the Bankruptcy Court entered an Order Denying Motion for Reconsideration (the "Order Denying Motion for Reconsideration"). *Id.*; *See* Petition at 16a-17a. Respondent appealed to the United States District Court for the District of New Jersey (the "District Court") from paragraph 2 of the Omnibus Order and from the Order Denying Motion for Reconsideration.

Thereafter, on April 10, 1995, oral argument with respect to the appeal filed by Respondent was heard by the Honorable Dickinson R. Debevoise, S.U.S.D.J. On April 10, 1995, the District Court reversed the Bankruptcy Court and entered an order remanding the matter to the Bankruptcy Court for dismissal of the Complaint. *See* Petition at 15a. On May 11, 1995, the Petitioner filed a Notice of Appeal to the Third Circuit. By Judgment Order dated March 12, 1996, the Third Circuit affirmed the order of the District Court without opinion. *See Id.* at 1a-3a.

B. Corrections of Misstatements in the Petition

The District Court Opinion correctly sets forth only the relevant facts in this case. In the interest of brevity, Respondent respectfully directs the Court to the District Court Opinion, attached as Appendix A, for a statement of facts.

Pursuant to United States Supreme Court Rule 15.2, Respondent hereby addresses misstatements of fact contained in the Petition. Preliminarily, Respondent objects to the insertion in the Petition of the long recitation of allegations incorrectly presented as fact in Petitioners' Statement of the Case regarding

the alleged fraud of Respondent, which are irrelevant to the granting of the Petition and are only presented as an attempt to inflame the Court. Also, Petitioners mislead the Court by stating that "the District Court did not disturb any of the factual determinations of the Bankruptcy Court since they were to be given conclusive effect unless they were found to be 'clearly erroneous'." *Id.* at 5. The District Court never adopted the factual determinations of the Bankruptcy Court. Rather, the District Court specifically noted that "[a]lthough the bankruptcy court made factual findings, the dispositive issue involves a legal determination, namely, whether a bankruptcy judge can extend the time for filing a complaint to determine dischargeability under Bankruptcy Rule 4007(c) for excusable neglect absent a motion to extend the time made before its expiration." Op. at 4a.

Petitioners statement that as a result of Respondent's own preparation of an improper matrix, Petitioners had *no notice* of the Bar Date is a misstatement of fact. Petition at 11. The Bankruptcy Court never made a finding that Petitioners lacked notice of the Bar Date. The Bankruptcy Court merely stated that its review of the Clerk's certification of mailing revealed that Petitioners did not receive the §341 notice from the Clerk. *See Id.* at 31a. To the contrary, the District Court, citing the Bankruptcy Court, specifically states that the Bankruptcy Court found that Petitioners attended the meeting of creditors and thus had *actual notice* of the Bar Date which would vitiate their ability to file out of time. Op. at 8a.

Petitioners also state to the Court that they had sent the Complaint for filing in a timely manner and with a recognized delivery agent. Petition at 11. Petitioners fail to point out that the Bankruptcy Court noted that although that was true, the envelope was not properly addressed, and thus undeliverable. *Id.* at 32a-33a.

Petitioners also mischaracterize the facts by their citation to three reasons for the untimely filing of the Complaint. Petition at 11. The reasons alleged are: (i) that the Bankruptcy Court had moved locations; (ii) that the envelope had been inadvertently addressed; and (iii) that the address set forth in the New Jersey Lawyers Diary listed the prior address of the Bankruptcy Court. *Id.* In making these

statements to the Court, Petitioners have failed to disclose that: (i) the Bankruptcy Court duly noted that the Bankruptcy Court had moved in late 1992, Tr. at 10a[2], some fourteen months prior to the Bar Date; (ii) that there is nothing in the record before the Bankruptcy Court that indicated that Petitioners' counsel did not know the proper address of the Bankruptcy Court; and (iii) that it was the 1993 New Jersey Lawyers Diary and Manual which still listed the previous address of the Bankruptcy Court[3], not the 1994 New Jersey Lawyers Diary and Manual which had the proper address of the Bankruptcy Court at the time the Complaint was to be filed.

Petitioners continually misstate the facts concerning whether they or their counsel ever received notice of the Bar Date to file the Complaint.[4] Petition at 3-4, 8, 11. Petitioners neglect to state that the Bankruptcy Court found that the Notice to Creditors, albeit without the name of the Petitioner's attorney or his law firm, was sent to "Sturbridge Office Park, Suite 1203", the office of Petitioners' attorney. Tr. at 11a-12a. The Bankruptcy Court also found that Petitioners had actual notice of the Bar Date. *Id.* at 12a-13a. The Bankruptcy Court found that Petitioners' counsel attended the first meeting of creditors under §341 of the Bankruptcy Code. *Id.* at 14a. Quite significantly, Petitioners' counsel attempted,

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[2]Respondent has annexed hereto excerpts from the transcript of the hearing before the Bankruptcy Court on the Reconsideration Motion held on November 1, 1994. References to the transcript pages attached hereto will be cited as "Tr." Rather than duplicate the efforts of Petitioners with regard to the other relevant Transcript excerpts, Respondent will refer to the pages of the Appendix annexed to the Petition where appropriate.

[3]At the hearing on the Reconsideration Motion, the Bankruptcy Court held that it was not making a finding on this fact, Tr. at 11a, but the Bankruptcy Court took judicial notice of such, *Id.*, and again later relies on such in its decision. *Id.* at 13a. Whether same can be classified as a "finding" by the Bankruptcy Court as Petitioners contend is unclear. Petitioners certainly had a duty to disclose that the Bankruptcy Court specifically noted it was not making a "finding" based upon this.

[4]According to the Notice of Commencement of Case Under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"), Meeting of Creditors, and Fixing of Dates (the "Notice to Creditors") which was sent out by the Clerk of the Bankruptcy Court, the first meeting of creditors was scheduled for December 27, 1993 and the "deadline to file a complaint to determine dischargeability of certain debts" was set as "February 25, 1994."

albeit unsuccessfully, to comply with the February 25, 1994 Bar Date[5]. Petition at 32a.

Finally, Petitioners suggest that some "negligence or misconduct of the debtor" *caused* the late filing of the Complaint; this was never a finding of the Bankruptcy Court and was not an issue which was raised below.

REASONS FOR DENYING THE PETITION

I

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' CLAIM THAT THEY HAVE BEEN DEPRIVED OF IMPORTANT PROPERTY RIGHTS AND WERE DENIED DUE PROCESS OF LAW

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*); *see also Tennessee v. Dunlap*, 426 U.S. 312 (1976) (Court refuses to review claims on certiorari on appeal which were not raised or addressed by the district court or court of appeals below). "The Court decides which questions to consider through well established procedures; allowing the able counsel who argue before us to . . . devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

For the first time, Petitioners argue before this Court that the District Court's application of the law has deprived them of important property rights and denied them due process of law. Petition at 8, 16. Petitioners never raised these arguments before the Bankruptcy Court, the District Court or the Third Circuit. There are no "unusual circumstances" cited by Petitioners that warrant addressing their arguments regarding forfeiture and denial of due process at this time. *See Taylor*, 503 U.S. at 646.

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[5]In light of the fact that Petitioners' counsel attempted to comply with the Bar Date by mailing by UPS the Complaint on February 24 (one day prior to the Bar Date), it seems disingenuous for Petitioners to state they never knew of the Bar Date. Petitioners never stated why they sent it on precisely that date.

II

EVEN IF THE COURT CONSIDERS PETITIONERS' CLAIM, THE HOLDING BELOW DID NOT DEPRIVE PETITIONERS OF IMPORTANT PROPERTY RIGHTS OR DENY PETITIONERS DUE PROCESS OF LAW

A. The Bankruptcy Code and Rules Provide Adequate Time for Notice and the Opportunity to be Heard

It is well established that the procedural due process protections of the Fifth and Fourteenth Amendments include the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) and cases cited therein; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process demands that the required notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). This Court has frequently recognized that due process is a variable concept which depends on the particular subject matter and circumstances of each given case. *See, e.g. Betts v. Brady*, 316 U.S. 455 (1942); *Moyer v. Peabody*, 212 U.S. 78 (1909). "[D]ue process of law has never been a term of fixed and invariable content." *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 264, 275 (1949).

The Federal Rules of Bankruptcy Procedure set forth the procedures relating to notice and time for filing objections to a debtor's discharge or to the dischargeability of a debt. Rule 4007(c) provides the general notice requirements and time frame that must be satisfied to discharge a debt under §523(c) of the Bankruptcy Code. Fed. R. Bankr. P. 4007(c). More specifically, Rule 4007(c) provides that a complaint to determine the dischargeability of any debt pursuant to §523(c) cannot be filed later than 60 days after the "first date set for the meeting of creditors held pursuant to §341(a)." *Id.*; *Dollinger v. Poskanzer (In re Poskanzer)*, 146 B.R. 125 (D.N.J. 1992). Furthermore, Rule 4007(c) also provides a creditor an opportunity to request an extension of the deadline. Fed. R. Bankr. P. 4007(c). However,

any request for an extension must be filed before the time for objection has expired. *Id.*[6]

A clear and unambiguous reading of Rule 9006(b)(3) also indicates that the bankruptcy court may only enlarge the time to file a complaint under Rule 4007(c), if the request is made under the conditions set forth in Rule 4007(c), which is before the deadline to file a complaint has expired. *See* Fed R. Bankr. P. 4007(c). From a literal reading of Rules 4007(c) and 9006(b)(3) there is no discretion for the court to extend the time to file a dischargeability complaint once the time to do so has expired. "[Rule] 9006 . . . provides no assistance to a party that has missed the deadline contained in [Rule] 4007." *Biederman v. Oury, DeClemente & Mizdol v. Chester & Biederman (In re Biederman)*, 165 B.R. 783, 788 (Bankr. D.N.J. 1994). The excusable neglect standard contained in Rule 9006(b)(1) does not apply in Rule 4007(c) situations. *Id.* "While Rule 9006(b)(1) does provide that enlargement of a time period may be sought on the basis that a failure to timely act was attributable to excusable neglect, it cannot be utilized to extend the [deadline] contained in [Federal Rule of Bankruptcy Procedure] . . . 4007." *Id.* "Rule 9006(b)(1) and Rule 9006(b)(3) are plainly intended to be mutually exclusive." *In re Klein*, 64 B.R. 372, 374 (Bankr. E.D.N.Y. 1986) (quoting *Vacariello v. Lagrotteria*, 43 B.R. 1007, 1013 (D.N.D. Ill. 1984)). As the advisory committee's note states, in discussing subdivision (b) of Rule 9006,

> Unless a rule which contains a specific authorization to extend time is listed in paragraph (3) of this subdivision, an extension of time may be granted under paragraph (1) of this subdivision. *If a rule is included in paragraph (3) an extension may not be granted under paragraph (1).*

Fed. R. Bankr. P. 9006(b) advisory committee's note (emphasis added).

The District Court correctly noted the only situation where a litigant would be denied due process, stating:

> Allowing a creditor without notice to file past the deadline is not a back door way of permitting excusable neglect, however. A creditor without notice of the deadline has not even had the opportunity to commit neglect, and it would be unfair (*and a violation of*

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[6]Rule 4007(c) provides: "[T]he motion *shall* be made before the time has expired." (emphasis added).

> *due process*) to bar that creditor from bringing a claim without notification of the deadline to file a Complaint.

Op. at 8a (emphasis added).

As was recognized by the District Court, the discretion to extend the time to file a complaint under Fed. R. Bankr. P. 4007(c) after the deadline has passed is limited. *Id.* (citing *Poskanzer*). Under §523(a)(3)(B) of the Bankruptcy Code only those creditors who lack notice *or* actual knowledge of the case are permitted a late filing of their complaint to the dischargeability of a debt. *Id.* (citing *Poskanzer* at 127-28). (emphasis added). "A plain-reading of the Code and the Bankruptcy Rules suggests that a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time." *Id.* (quoting *Poskanzer* at 128).

As the District Court stated, "the plaintiffs obviously had actual notice of the deadline for the filing of their Complaint against the defendant because their attorney attended the December 27, 1993 creditors' meeting. In light of the fact that the plaintiffs had actual notice of the February 25, 1994 filing deadline, plaintiffs cannot file late." Op. at 8a.

Accordingly, the holding of the Third Circuit affirming the District Court does not require a bankruptcy court to be "blind" to negligence or misconduct of a debtor in not providing notice to a creditor of filing, as Petitioners suggest. Petition at 9-10. If a debtor fails to list a creditor, and that creditor does not have actual notice, the Court can permit the untimely filing of a dischargeability complaint under 11 U.S.C. §523(a)(3)(B). Since it was found that Petitioners had actual notice of the Bar Date, Petitioners were required to *file* their complaint in a timely manner[7]. As the Bankruptcy

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[7]Commencement of an adversary proceeding is governed by Fed. R. Bankr. P. 7003, which makes Fed. R. Civ. P. 3 applicable to adversary proceedings. Fed. R. Civ. P. 3 provides: "A civil action is commenced by *filing* a complaint with the court." (emphasis added).

The Rule does not state that mailing the complaint completes commencement. The complainant must file the complaint within the applicable periods to properly commence the adversary proceeding. *See In re Jeffrey*, 169 B.R. 25, 27 (Bankr. D. Md. 1994) ("The mere mailing of a pleading within a required filing period is insufficient to constitute a filing within that time period").

Appellate Panel of the Ninth Circuit held: "There is no deprivation of Due Process since [the creditor] had actual notice of the Chapter 7 case and had sufficient time to file a complaint to determine dischargeability of a debt under §523(a)." *Herndon v. De La Cruz (In re De La Cruz)*, 176 B.R. 19, 23-24 (Bankr. 9th Cir. 1994).

Petitioners also argue that the fact that they advised Respondent's counsel by phone of the intended filing of the Complaint should excuse the late filing. This was not a finding of the Bankruptcy Court nor addressed by the District Court. Nowhere in the Federal Rules of Bankruptcy Procedure, nor in any case cited by Petitioners, does it indicate counsel's knowledge of a creditor's intention to file a dischargeability complaint will serve as a substitute for timely filing of a complaint. *See Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 37 F.3d 1354, 1357 (9th Cir. 1994).

Petitioners next argue that Respondent's removal of the state court action to the Bankruptcy Court "constituted compliance with the requirement that a Complaint to Determine Dischargeability be filed." Petition at 10. Petitioners cite the case of *Williams v. Gurley (In re Williams)*, 3 B.R. 401 (Bankr. N.D. Ga. 1980). However, nowhere in *Williams* does the court conclude that the removal to a bankruptcy court of a pending state court action constitutes compliance with the requirement that a complaint to determine dischargeability be filed. *Williams* stands only for the proposition that, with respect to a 11 U.S.C. §523(a)(5) exception to discharge, bankruptcy law, not state law, determines whether an obligation in question is in the nature of alimony, maintenance, or support. *Williams*, 3 B.R. at 403. The only discussion of removal to a bankruptcy court by the *Williams* court, was its notation as to the availability of the removal process under 28 U.S.C. §1478(a). *Id.*

Finally, Petitioners citation of *Legacy, Ltd. v. Channel Home Centers, Inc. (In re Channel Home Centers, Inc.)*, 989 F.2d 682 (3rd Cir. 1993) is misplaced and is not a basis for this Court to grant the Petition. Petitioners cite *Channel* for the proposition that "even unambiguous statutory language need

not be followed in those 'rare cases [in which] the literal application of a statute[8] will produce a result demonstrably at odds with the intentions of its drafters.'". *Id.* at 687. However, this does not give the court license to disregard clear language merely because Petitioners claim equity is on their side. *See Norfolk & Western Ry. Co. v. American Train Dispatchers Assn.*, 499 U.S. 117, 128 (1991). Regardless, *Channel* is clearly distinguishable as it dealt with the assumption or rejection of a commercial lease under §365(d)(4)[9], not the time period to file a dischargeability complaint.

Furthermore, Petitioners fail to state how this case would produce a result "demonstrably at odds" with the intention of Congress. In fact, the promulgation of the current Federal Rules of Bankruptcy Procedure pursuant to 28 U.S.C. §2075 foreclosed a creditors right to file such complaints. Under the former rules, the court was empowered with discretion to allow an untimely complaint. *See* Op. at 6a (citing former Bankruptcy Rule 906(b)). The promulgation of Rule 9006(b)(3), after careful consideration, specifically stripped the bankruptcy court of any discretion when a dischargeability complaint was not timely filed. Rule 9006(b)(3) marks a change from the practice under the former bankruptcy rules, which permitted a court to allow a late filed discharge or dischargeability complaint upon a showing of excusable neglect. *See Manufacturers Hanover Trust Co. v. Horvath (In re Horvath)*, 20 B.R. 962 (Bankr. S.D.N.Y. 1982). "It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable

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[8]Petitioners assert that the federal question here is governed, not by a statute, but by a "mere" Rule of Procedure. Petition at 11. While it is true that the Federal Rules of Bankruptcy Procedure do govern here, Petitioners assertion of the apparent proposition that a court may apply the Federal Rules of Bankruptcy Procedure thoughtlessly, or that a court is permitted to disregard rules promulgated by this Court more so than it would be permitted to disregard a "statute" is simply untrue and unfounded.

[9]11 U.S.C. §365(d)(4) provides in pertinent part:

> [I]f the Trustee does assume or reject an unexpired lease of nonresidential real property under which the debtor is a lessee within 60 days after the date for the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected....

neglect in failing to timely object to discharge of a claim." *In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983). If anything, to hold that the court has discretion would be "demonstrably at odds" with the intention of Congress.

B. Bankruptcy Code §105 Provides No Relief to Petitioners

Petitioners ask that the Petition be granted because the application of Rule 4007(c) and Rule 9006(b)(3) deprives a bankruptcy court of its equitable powers under §105 of the Bankruptcy Code. (Petition at 10). This Court has held to the contrary. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). "A bankruptcy court does not have unfettered equity powers." *Wasserman v. Immormino (In re Granger Garage, Inc.)*, 921 F.2d 74, 77 (6th Cir. 1990) (citing *Ahlers*, 485 U.S. 197). "Equity aids the vigilant, not those who slumber on their rights." 3 *Pomeroy's Equity Jurisprudence* §§ 418, 419 at 169-71 (S. Symons 5th ed. 1941) (cited in *Jones v. U.S. Dep't of Treasury, I.R.S. (In re Jones)*, 129 B.R. 1003, 1011 (Bankr. N.D. Ill. 1991)); *see also Baker v. Cummings*, 169 U.S. 189 (1898) ("[E]quitable powers will not be exercised to discover whether one has been wronged, when, with full knowledge of the alleged wrong, he has . . . slept upon his rights until such situation has arisen as to render it inequitable to afford him relief."); *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994) ("bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language.") (quoting *Childress v. Middleton Arms, L.P. (In re Middleton Arms, Ltd. Partnership)*, 934 F.2d 723, 725 (6th Cir. 1991)); *In re Morristown & Erie R.R.*, 885 F.2d 98, 100 (3d Cir. 1989) ("Section 105 gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. Nor does section 105(a) give the court the power to create substantive rights that would otherwise be unavailable under the Code." (citations omitted)).

It is axiomatic that bankruptcy courts must adhere to the clear intent of Congress. When statutory

language is clear and unambiguous it must be followed. *Rake v. Wade*, 508 U.S. 464, 471 (1993); *Patterson v. Shumate*, 504 U.S. 753, 757 (1992); *Prisco v. Talty*, 993 F.2d 21, 24 (3d Cir. 1993). "[The] Court is bound to apply the plain meaning of the statute even when the application apparently results in an apparent anomaly." *Michel v. Eagle-Picher Industries, Inc. (In re Eagle-Picher Industries, Inc.)*, 999 F.2d 969, 972 (6th Cir. 1993).

"The Fed. R. Bankr. P. are to be liberally construed 'to secure the just . . . determination of every case and proceeding.' Fed. R. Bankr. P. 1001. However, the spirit of liberal construction does not allow the court to ignore procedural rules altogether." *In re Gray*, 156 B.R. 707, 711 n.10 (Bankr. D. Me. 1993); *see also* 4 Charles A. Wright and Arthur B. Miller, *Fed. Prac. & Proc.*, §1029 n.12 (collecting cases). "To the extent consistent with due process, the bankruptcy court's powers are . . . constrained by the Fed. R. of [sic] Bankr. P." *Gray* 156 B.R. at 709 (citing *Taylor v. Freeland & Kronz*, 112 S. Ct. at 1649 (503 U.S. at 645)).

In support of the Petition, Petitioners only cite cases which underlie the basic premise of §105, all of which are factually distinguishable. They are, in effect, the *Pepper v. Litton*, 308 U.S. 295 (1939) progeny. However, as pointed out, §105 has limits. Petitioners have failed to cite even a single case in which §105 was used by a court to allow a late filing of a complaint in the same context as faced by Petitioners.

Petitioners also contend that bankruptcy courts have not been deprived of equitable powers in similar circumstances. Petition at 13. In support of this contention, Petitioners assert that discretion to extend the deadline to object to exemptions under circumstances of excusable neglect exists under Rule 4003 and similarly should exist under Rule 4007(c). This Court has held to the contrary in *Taylor*, 503 U.S. 638, where it denied the application of the excusable neglect standard under Rule 4003(b). Shamefully, Petitioners ignore *Taylor* and intentionally cite three cases that do not apply to Rule 4003(b), although Petitioners assert that they do. Those cases are *Martine v. Cipa (Matter of Cipa)*, 11 B.R. 968

(Bankr. W.D. Pa. 1981); *Ragsdale v. Genesco, Inc.*, 674 F.2d 277 (4th Cir. 1982); and, *Lipshie v. Bartley (In re Bartley)*, 33 B.R. 768 (Bankr. E.D.N.Y. 1983)[10]. This misleading argument was raised by Petitioners in the District Court[11] citing precisely the same cases. The District Court rejected this argument, noting:

> Petitioners do cite to a number of cases which allow late filings of objections to exemptions upon the demonstration of inequities. *See* Petitioners' Brief at 14 (citing *Matter of Cipa*, 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); *Ragsdayle* [sic] *v. Genesco, Inc.*, 674 F.2d 277, 278 (4th Cir. 1982); *In re Bartley*, 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983)). The plaintiffs' argument by analogy to the filing of a Complaint is not necessarily a bad one. However, the plaintiffs' citation to law prior to the adoption of the current Bankruptcy Rules is problematic because Congress has done away with the excusable neglect standard in the context of the filing of objections as well. *See* Bankruptcy Rule 4003.

Op. at 6a, n.2.

III

THE SUPREME COURT HAS ALREADY RULED IN A SIMILAR CONTEXT THAT DEADLINES IN THE FEDERAL RULES OF BANKRUPTCY PROCEDURE ARE TO BE CONSTRUED STRICTLY

In a case addressing a rule with similar application to that in the case at bar, this Court has made it clear that certain deadlines in bankruptcy rules mean what they say and that violations of such deadlines cannot be ignored or excused. *Taylor*, 503 U.S. 638. *See* 8 Lawrence P. King, et al., *Collier on*

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[10]Each of the three cases cited by Petitioners was decided under the old Federal Rules of Bankruptcy Procedure not applicable to this case. Petitioners at least had a duty to point out to the Court that the Federal Rules of Bankruptcy Procedure applicable therein were not the same as those currently enacted. Petitioners also had a duty to compare the Federal Rules of Bankruptcy Procedure cited by the respective courts with the Federal Rules of Bankruptcy Procedure currently enacted.

[11]In the Reply Brief of Appellant/Defendant Donald Edward Hamer filed with the District Court on February 28, 1995 at 9 n.2, and the Brief of Appellee/Defendant Donald Edward Hamer filed with the Third Circuit on November 19, 1996 at p. 30, n.16, counsel for Respondent pointed out to Petitioners that these cases were no longer good law in light of the fact that Congress amended the Federal Rules of Bankruptcy Procedure, removing the courts' discretion to apply excusable neglect in the context of dischargeability complaints. Despite being apprised by Respondent's counsel, and the admonishment of the District Court that the excusable neglect standard in this case, and *Cipa*, *Ragsdale*, and *Bartley* had been legislatively overruled, Petitioners have again cited them as authority.

Bankruptcy ¶4007.05, p. 4007-9 (15th ed. 1995). *Taylor* involved the time limit to file an objection to an exemption of property taken under §522(*l*). There the Trustee failed to file an objection to a stated exemption within the time prescribed by Rule 4003(b). This Court affirmed the holding of the Third Circuit which specifically held that the deadlines enunciated in Rule 9006(b)(3) are to be applied strictly without any leeway. See *Taylor v. Freeland & Kronz*, 938 F.2d 420 (3d Cir. 1991)[12]. Rule 4003(b), like Rule 4007(c), is one of the rules enumerated in Rule 9006(b)(3).

In analyzing whether the court could extend such time, the Third Circuit looked at Rule 9006(b)(3) and stated:

> Bankruptcy Rule 9006(b)(3) allows enlargement of the time period for taking action under certain bankruptcy rules, but specifically states that the court "may enlarge the time for taking action under [Rule] . . . 4003(b) . . . only to the extent and under the conditions stated in those rules."

Id. at 423. Since Rule 4003(b) and 4007(c) are both rules enumerated in Rule 9006(b)(3), without distinction, there is no reason why there should be a different application of Rule 9006(b)(3) in the context of Rule 4007(c).

IV

THE DECISION BELOW IS NOT IN CONFLICT WITH A RELEVANT DECISION OF THE SUPREME COURT

Petitioners assert that the holdings of the District Court and Third Circuit below conflict with the holding espoused by this Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380 (1993), which empowers a bankruptcy court to apply excusable neglect in appropriate circumstances. Petitioners posit that the liberal "excusable neglect" standard set forth in *Pioneer* should be applied to Rule 4007(c).

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[12]In the context of Rule 4003(b), this Court has noted, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor*, 503 U.S. at 644; *see also Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Of course there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process."); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988).

Presumably the District Court and the Third Circuit did not address *Pioneer* because of its inapplicability. Respondent submits that the holding below is wholly in concert with the guidelines this Court has set forth in *Pioneer* regarding when "excusable neglect" should be applied. Footnote 4 in *Pioneer* provides in pertinent part:

> The time-computation and -extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard.

Pioneer, 507 U.S. at 389, n.4. As noted throughout, Rule 4007(c) is one of the time requirements listed as excepted in 9006(b)(3). Accordingly, a reading of *Pioneer* clearly indicates that it has no application under Rule 4007(c) as the Petitioner asserts. *Pioneer* "is not properly read as setting an across the board standard of 'excusable neglect'." *In re Mowers* 160 B.R. 720, 723 (Bankr. N.D.N.Y. 1993). As this Court noted in *Pioneer*, excusable neglect should only be used to excuse late filings "where appropriate." *Pioneer*, 507 U.S. at 388. *Pioneer* simply elucidated the meaning of "excusable neglect" under 9006(b)(1). *Mowers*, 160 B.R. at 724; *see also Gray*, 156 B.R. at 710 (Bankr. D. Me. 1993) (citing *Pioneer*, 113 S. Ct. at 1497 (507 U.S. at 393-94)) ("Although some rules permit relief from orders or from other consequences of default upon a showing of excusable neglect, such relief is sometimes expressly unavailable.").

> Given the whole discussion in *Pioneer* focusses on Fed. R. Bankr. P. 9006(b)(1), *Pioneer* may appropriately be applied in all instances where Fed R. Bankr. P. 9006(b)(1) governs the enlargement of time frames prescribed by the other bankruptcy rules. *However, pursuant to subsection (b)(3) of 9006, and as noted by the Supreme Court at __ U.S. __ n.4, 113 S. Ct. at 1495 n.4, the times provided under Fed. R. Bankr. P. [4007(c)] are specifically excepted from the reach of Fed. R. Bankr. P. 9006(b)(1).*

Mowers, 160 B.R. at 724 (emphasis added).

Since *Pioneer* is clearly inapplicable, Respondent will not respond to the five factor "*Dix*" test as adopted by *Pioneer* and discussed in detail in the Petition.

V

THE THIRD CIRCUITS HOLDING IS NOT IN CONFLICT WITH THE HOLDING OF ANY OTHER CIRCUIT

As the District Court noted, "every decision dealing with the issue at bar has held that excusable neglect cannot be used in the context of Rule 4007(c)." Op. at 6a and cases cited therein at 6a-8a. Petitioners assert that the holding of United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") in *Manufacturers Hanover v. Dewalt (In re Dewalt)*, 961 F.2d 848 (9th Cir. 1992) is in conflict with the holdings of other United States Circuit Courts of Appeal. This simply is not true. The Ninth Circuit holding in *Dewalt* merely set a thirty day actual notice limit as the benchmark for determining the appropriateness of equitable relief. *See Dewalt*, 961 F.2d at 851. In that case the bankruptcy court had dismissed a complaint objecting to dischargeability which was filed over four months after the complaint bar date because the creditor knew of the bar date only seven days prior thereto, but did not seek an enlargement of time. The Bankruptcy Appellate Panel affirmed, but the Ninth Circuit reversed, holding that the creditor had to have more than seven days notice of the bar date. While the Ninth Circuit declined to set a bright-line rule, the court felt that a creditor should generally have a 30-day window of opportunity, as contemplated by Rule 4007(c). The critical "factor" that separated *Dewalt* from the case at bar and other Ninth Circuit rulings, was that the creditor only had seven days notice prior to the bar date. The Ninth Circuit stated that seven days was simply not enough time to put a creditor on notice.

In fact, when confronted with facts similar to the case at bar, the Ninth Circuit has, after *Dewalt*, held that notice is sufficient when the creditor has actual notice of the bankruptcy filing in time to file a complaint under 11 U.S.C. §523(a). *Kelly v. Gordon (In re Gordon)*, 988 F.2d 1000 (9th Cir. 1993) (holding that 57 days notice before deadline to file a complaint under 11 U.S.C. §523(a) was sufficient notice when creditor had actual notice of filing); *De La Cruz*, 175 B.R. at 23 ("Since creditor had more

than 30 days notice of the bankruptcy case, she had sufficient notice."). In *Gordon*, the creditors sought equitable relief from the limitations period on the ground that the debtor's attorney notified only one of three state court plaintiffs/creditors of the bankruptcy filing. However, the two other creditors received actual notice of the bankruptcy case 57 days prior to the bar date. Thereafter, those creditors filed a complaint objecting to dischargeability two days after the deadline to do so. The bankruptcy court dismissed the complaint as untimely. In affirming the denial of equitable relief, the Ninth Circuit followed the dictate of *Lompa v. Price (In re Price)*, 871 F.2d 97, 99 (9th Cir. 1989), holding that "[c]ounsel for the appellant[s] in the present appeal was given actual notice of the bankruptcy proceedings in time to file a complaint, or at least to file a timely motion for an extension of time." *Gordon*, 988 F.2d at 1001. Presumably, Petitioners were cognizant of the holding in *Gordon* as they have cited to it. Petition at 7. Accordingly, the Ninth Circuit is not in conflict with the holding of the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: July 31, 1996

Respectfully submitted,

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By: _____
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APPENDIX A-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 13, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE DONALD E. HAMER
BERDJ MOVSESIAN, ADRIENNE MOVSESIAN, NOUBAR MAHDESSIAN, ANN MAHDESSIAN, A & N, INC. and BERDJ & NOUBAR CORP., **Plaintiffs/Appellees,** **vs.** **DONALD E. HAMER,** **Defendant/Appellant.**

Civ. No. 95-81
OPINION

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Debevoise, Senior District Judge.

This an appeal of a decision of the bankruptcy court. The question on appeal is whether the bankruptcy court erred in not dismissing plaintiffs' Complaint to Determine Dischargeability for late filing. For the reasons set forth below, the decision of the bankruptcy court is reversed.

Appendix A

BACKGROUND

On March 5, 1990, Berdj Movesian, Adrienne Movsesian, Moubar Mahdessian, Ann Mahdessian, Berdj & Noubar Corporation, and A & N Inc. ("plaintiffs"), instituted a lawsuit in the Superior Court of New Jersey, Law Division, Camden County, against Donald E. Hamer, and Route 541-23, Inc. ("Rt. 541") and Mt. Holly Car Wash, Inc. ("Mt. Holly"), companies which were wholly owned by Hamer. The plaintiffs alleged, inter alia, fraud, misrepresentation, and violation Of the New Jersey Consumer Fraud Act by Hamer in connection with Hamer's sale to the plaintiffs of a car wash business and the underlying real property.

On October 25, 1993, Hamer, Rt. 541, and Mt. Holly filed Chapter 11 bankruptcy petitions with the Bankruptcy Court. The state court action of plaintiffs was removed to the United States District Court for the District of New Jersey, and pursuant to the local rules, were referred to the bankruptcy court. The first creditors' meeting was scheduled for December 27, 1993. Although counsel for the plaintiffs did not receive the court's notification of the meeting because the notice sent did not include name of counsel in the address, counsel for plaintiffs attended the creditor's meeting. Under Bankruptcy Rule 4007(c), 60 days after the first creditors meeting, all creditors were required to file a Complaint to Determine Dischargeability of debt. Therefore, a deadline was set for February 25, 1994.

Plaintiffs filed a Complaint to Determine Dischargeability with the bankruptcy court on February 28, 1994. The Complaint was filed one day later than the filing deadline, taking into consideration the weekend.

On March 29, 1994, Hamer filed a motion to dismiss the adversary proceeding because the Complaint was filed after the deadline to do so. In response to the dismissal motion, the plaintiffs filed a Certification of Jennifer P. Iommie dated April 11, 1994 in which she stated that the reason the Complaint was sent to the Bankruptcy Court late was because she "looked in a book where [she] had the

Court's address and [she] addressed the package to said address." She was "not aware that, since so listing the address, the Court had moved across the street . . . ."

On September 8, 1994, the Bankruptcy Court heard oral argument with respect to the dismissal motion and thereafter entered its opinion on the record denying the dismissal motion. The bankruptcy court ruled that plaintiffs' late filing of the complaint was excusable neglect. An order was entered on September 28, 1994.

Hamer filed a motion for reconsideration on September 26, 1994. At the hearing on the Reconsideration Motion on November 1, 1994, the Bankruptcy Court heard oral argument and thereafter entered its opinion on the record denying the Reconsideration Motion. The Order Denying Motion for Reconsideration was subsequently entered on November 14, 1994.

The bankruptcy court gave three reasons for its denial of defendant's motion to dismiss. The first was the fact that the notification sent to plaintiffs' counsel did not include counsel's name on the address. The second was that, although plaintiffs sent their Complaint to the bankruptcy court on time, they used the old address of the bankruptcy court on the envelope and so the Complaint did not reach the bankruptcy court until the next day. The third is that the defendant removed the matter with the plaintiffs from state court to the bankruptcy proceeding, and therefore the defendant had notice of the plaintiffs" claim. See Transcript Proceedings of before Bankruptcy Judge Tuohey at 67-69 (Nov. 1, 1994).

STANDARD ON APPEAL

The proper standard of review to be applied by a district court when reviewing a ruling of a bankruptcy court is determined by the nature of the issues presented on appeal. The factual determinations of the bankruptcy court are to be given conclusive effect unless they are "clearly erroneous." See Landon v. Hunt, 977 F.2d 829, 830 (3d Cir. 1992); J.P. Fyfe, Inc. v. Bradco Supply Co., 891 F.2d 66, 69 (3d Cir. 1989); In re Morrissey, 717 F.2d 100, 104 (3d Cir. 1983); Mellon Bank

Appendix A

v. Makoroff, 153 B.R. 155, 157 (W.D. Pa. 1993); In re Continental Airlines, 150 B.R. 334, 336 (D. Del. 1993). Legal conclusions of the bankruptcy court, on the other hand, are to be accorded no deference and are subject to de novo or plenary review by the district court. See Landon, 977 F.2d at 830; J.P. Fyfe, 891 F.2d at 69; Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988); Mellon Bank 153 B.R. at 157; Continental Airlines, 150 B.R. at 336.

Although the bankruptcy court made factual findings, the dispositive issue involves a legal determination, namely, whether a bankruptcy judge can extend the time for filing a complaint to determine dischargeability under Bankruptcy Rule 4007(c) for excusable neglect absent a motion to extend the time made before its expiration. Thus the bankruptcy court's decision is subject to de novo review.

DISCUSSION

On appeal to this court is the following issue: Whether a bankruptcy court can allow a plaintiff to file a Complaint to Determine Dischargeability ("Complaint") late if the late filing was the result of excusable neglect. I hold that a bankruptcy court cannot allow a plaintiff to file a late Complaint, even if excusable neglect is found to exist, unless the plaintiff follows the Procedure set out in Bankruptcy Rule 4007(c). Because the plaintiffs in this case filed late, and failed to follow Bankruptcy Rule 4007(c), the bankruptcy judge erred when he did not grant the defendant's motion dismiss their Complaint. The bankruptcy judge's decision to relieve plaintiffs of the filing deadline by use of excusable neglect violated the Bankruptcy Rules.

Under Bankruptcy Rule 4007(c), the filing deadline for a Complaint is 60 days after the first creditors' meeting. In this case, the creditors' meeting was on December 27, 1993. Therefore the deadline for filing the Complaint was set at February 25, 1994. Although plaintiffs failed to meet this deadline, the bankruptcy court denied defendants motion to dismiss the Complaint, ruling that plaintiffs, failure to meet the deadline was excusable neglect. This decision, however, is contrary to a plain reading

of the Bankruptcy Rules.

Bankruptcy Rule 4007(c) states as follows.

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankruptcy Rule 4007(c). Rule 4007(c) is clear: a party may file a late Complaint with the court, but only if the party first moves to extend the time period for filing.

Bankruptcy Rule 9006(b) governs enlargement of time periods under the Bankruptcy Rules. Subsection (1) covers filing extensions generally:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankruptcy Rule 9006(b)(1). Therefore, a bankruptcy court is generally accorded the power to enlarge time periods if excusable neglect is demonstrated. However, this provision is limited subsections (2) and (3).

Subsection (3) applies to Rule 4007(c). This subsection states as follows:

> The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

Bankruptcy Rule 9006(b)(3). The power granted by Rule 9006(b)(1) to enlarge applicable time periods if excusable neglect is demonstrated by a party is, by this subsection, explicitly withheld from courts in the context of Rule 4007(c). Subsection (3) only allows a court to enlarge the time period in which to file a Complaint as that rule permits: when a party makes a motion <u>before</u> the 60 day time period expires.

The plaintiffs failed to make a motion to extend their time to file a Complaint before the 60 day

period expired, and, under Rule 9006(b), the bankruptcy court is not permitted to take into account excusable neglect to relieve plaintiffs of the deadline. Therefore, the bankruptcy court was in error when it decided that the plaintiffs' failure to file by the February 25, 1994 deadline was excusable neglect.

The holding that a court is only able to relieve a creditor of the filing deadline if a party makes a motion before the deadline is further bolstered by the fact that under the former Bankruptcy Rules a court was allowed to relieve a party from a Complaint filing deadline if the court found excusable neglect. See former Bankruptcy Rules 409(a)(2) & 906(b). As one judge has stated: "It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim." In re Figueroa, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983).

Although the Third Circuit has not ruled on whether a bankruptcy court can excuse the late filing of a Complaint when a deadline is set pursuant to Rule 4007(c),[1] a number of courts have ruled on this issue. The plaintiffs have failed to cite any case in which a court has ruled under the current Bankruptcy Rules that a court may consider excusable neglect when a creditor failed to file a Complaint within the time allowed under Rule 4007(c).[2] On the other hand, every decision dealing with the issue at bar has

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[1] In In re Poskanzer, 146 B.R. 125 (D.N.J. 1992), Judge Wolin noted, however, that the Third Circuit "has generally interpreted other Code filing dates strictly. Id. at 129-30 (citing In re Verientes, Ltd., 845 F.2d 57 (3d Cir. 1988); Taylor v. Freeland & Kronz, 938 F.2d 420 (3d Cir. 1991); Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911 (3d Cir. 1991)).

[2] Plaintiffs do cite to a number of cases which allow late filings of objections to exemptions upon the demonstration of inequities. See Plaintiffs' Brief at 14 (citing Matter of Cipa, 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); Ragsdayle v. Genesco, Inc., 674 F.2d 277, 278 (4th Cir. 1982); In re Bartley, 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983)). The plaintiffs' argument by analogy to the filing of a complaint is not necessarily a bad one. However, the plaintiffs' citation to law prior to the adoption of the current Bankruptcy Rules is problematic because Congress has done away with the excusable neglect standard in the context of the filing of objections as well. See Bankruptcy Rule 4003.

held that excusable neglect cannot be used in the context of Rule 4007(c). See Kelly v. Gordon (In re Gordon), 988 F.2d 1000, 1001 (9th Cir. 1993) (plaintiffs could not be relieved of 4007(c) deadline by snowing excusable neglect); Byrd v. Alton (In re Alton), 837 F.2d 457, 459 (11th Cir. 1988) ("The dictates of the Code and Rules are clear. It is not our place to change them. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made before the running of that period."); Jones v. Hill (In re Hill), 811 F.2d 484, 486 (9th Cir. 1987), In re Poskanzer 146 B.R. 125, 127 (D.N.J. 1992) ("A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date."); In re Biederman, 165 B.R. 783, 788 (Bankr. D.N.J. 1994) ("a court has limited discretion to extend the deadlines for filing complaints objecting to the debtors discharge, or the dischargeability of a creditor's claim and has no jurisdiction for doing so if the request for an extension is made after the deadline has expired"); In re Jeffrey, 169 B.R. 25, 27 (Bankr. D. Md. 1994) ("the Court is powerless to extend the deadline"); In re Klein, 64 B.R. 372, 376 (Bankr. E.D.N.Y.) ("under the new bankruptcy rules, a court cannot allow extension of deadline for excusable neglect"). In addition, courts have also held that excusable neglect cannot be used under Rule 4004(a). See e.g., In re McDowell, 57 B.R. 310 (Bankr. M.D. Penn.) ("this court lacks authority to grant untimely requests for extensions even where the requests are late due to alleged excusable neglect"); In re Smithuysen, 54 B.R. 661 (Bankr. D. Md. 1985) ("[t]his Court is quite restricted in its discretion to enlarge the time period to permit [plaintiff] to file his complaint").

The only situation in which courts have held that a party can file a late Complaint is where the court itself failed to give the party notice of the creditors' meeting or gave incorrect information about the filing deadline. See, e.g., In re Poskanzer, 146 B.R. at 127-28; In re Hershkovitz, 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989) ("this Court finds that it would be a great injustice if Plaintiffs were precluded from maintaining their dischargeability complaint against Defendant-Debtor simply because they

relied on an order of the court which was erroneously entered").

In Poskanzer, Judge Wolin explained as follows:

> A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date. Bankr.R. 9006(b)(3). A creditor's receipt of inadequate notice represents one instance where courts have traditionally extended the time to file the complaint. But this discretion is limited. More specifically, section 523(a)(3)(B) of the Code tempers the discretion permitted under the Bankruptcy Rules by limiting late filing only to those creditors who lack notice or actual knowledge of the case to permit timely filing. A plain-reading of the Code and the Bankruptcy Rules suggests that a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time.

Id. (footnotes omitted).

In other words, absent moving for an extension of time as provided in Rule 4007(c), a creditor can only file a Complaint past the deadline if the plaintiff failed to receive a notice from the court or actual notice of the proper deadline. Allowing a creditor without notice to file past the deadline is not a back door way of permitting excusable neglect, however. A creditor without notice of the deadline has not even had the opportunity to commit neglect, and it would be unfair (and a violation of due process) to bar that creditor from bringing a claim without notification of the deadline to file a Complaint.

In the case at bar, plaintiffs assert that they never received the notification of the deadline from the court because their lawyer's name was not included as part of the address. However, as the bankruptcy judge noted, the plaintiffs obviously had actual notice of the deadline for the filing of their Complaint against defendant because their attorney attended December 27, 1993 creditors' meeting. In light of the fact that plaintiffs had actual notice of the February 25, 1994 filing deadline, plaintiffs cannot file late.

Although barring the plaintiffs from filing a complaint in this case may seem inequitable, Congress has not provided for any other result. In a case construing the Federal Rules of Civil Procedure in which a similar result was reached, the Supreme Court declared: "Of course there is an element of

arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." Schiavone v. Fortune, 477 U.S. 21, 31 (1986). See also, Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988). In addition, the Third Circuit has acknowledged that the purpose of the Code and the Bankruptcy Rules in refusing to permit a late filing: "[T]he time limits of the statute and bankruptcy rule 'serve the dual purposes of finality and certainty. in the bankruptcy context, the need for finality and certainty is especially acute.' While we recognize that our result could grant a debtor an 'undeserved windfall' we point [ ] out that '[t]hat is true of enforcement of all procedural rules.'" Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911, 914 (3d Cir. 1991).

CONCLUSION

The bankruptcy court erred in not dismissing plaintiffs' complaint to determine Dischargeability for failure to file it within the time required under the Bankruptcy Rules. The matter will be remanded to the bankruptcy court for dismissal in accordance with this opinion. An appropriate order follows.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.D.J.

Date: April 10, 1995

Appendix B

APPENDIX B-EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY ON NOVEMBER 1, 1994, PP.46-49, 58-60.[1]

***[46]** State Court and other items. The only issue before me today is the narrow question of the debtor asking this Court to reconsider its ruling that adversary Complaint 94-2126 is time barred in that it seeks to object -- to discharge, and that since it was filed out of time, this Court should reconsider its ruling of September 8th and in effect, at this point, time bar the suit.

Now, really the record that I rule on is the record that was before me on September 8th. The only thing I am noting, all of the exhibits that we've marked today as Exhibits D-1 through D-4 to make the argument a little more coherent, were clearly before the Court. They're exhibits taken from the original bankruptcy file of Mr. Hamer in his Chapter 11. We have marked them from the clerk's file today as D-1, D-2, D-3 and D-4. Each of those exhibits was referred to in the transcript on September 8th and so I've not opened up the record today and taken new evidence, and I'm considering this strictly as a Motion for Reconsideration based on the prior record and all we've done is mark the exhibits for clarification purposes. Probably should have done that on September 8th and I didn't.

I note initially that the transcript and my -- one factual point in my transcript is incorrect and I so note incorrect that page 55 of the September 8th transcript commencing at line 11 when I make a ruling that the Bankruptcy ***[47]** Court moved from what is referred to as the Rodino building to what is referred to as the Martin Luther King Courthouse occurred in December of '93. I was off by one year. It points to my slip into senility. The move did occur in December of '92 and today, all -- both sides in the Court agree that I mis-spoke when I made that reference in the page 55 of the transcript.

I do note, however, I just -- out of curiosity, I pulled the 1993 Diary. The 1993 Lawyer's Diary,

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[1]The page numbers of the excerpt shall be preceded by a "*" and followed by the page number of the transcript of the hearing before the Honorable William F. Tuohey, U.S.B.J. on the Reconsideration Motion as transcribed by L.B.S. Inc., which is the same transcript as provided in the Petition.

on page 44 and 45 refers to Bankruptcy Court and addresses and refers to our address throughout the 1993 Lawyer's Diary as being the Rodino Building, so-called 970 Broad Street, Newark. So anyone throughout 1993 that looked in the Lawyer's Diary even though we had moved in December of '92 would have beet advised that we were still in the Rodino building. I note that simply because those Lawyers Diaries are published months before the end of the year. That '93 Diary undoubtedly came in in November before -- a few days before we moved. I'm not making a finding on that. There's no, really, record to support it but I just simply note -- I think I can take judicial notice of the fact that the Lawyers Diary for 1993 which all of us I'm sure have before us, did still use the old address for whatever reason.

All right. Now, I'm convinced that I was correct in my finding despite the strenuous argument of debtor's counsel today that the notice to creditors there is no proof in the *[48] record that the notice to creditors received by any of the individual plaintiffs who seek to have their debt nondischarged. In fact, the notice to creditors which we marked today As D-3 has an Affidavit from the clerk of the Court that he did not, that the clerk was not able to mail it to the individuals. The reason for that is reflected in D-4, the schedules and matrix which the clerk works from and while there are a series of names on the very first page of Exhibit D-4 in evidence such as Movsesian, there are group of plaintiffs herein called Movsesian and another group called Mahdessian, M A H D E S S I A N. There's no address presented in the box next to those names.

Now, debtor argues strenuously that if you continue reading the first page of D-4, you come to an entry that says after those names that I have read, c/o Markwardt and Katkocin with a Sturbridge Office Park and a Suite 1203 address in Voorhees, New Jersey. Now, it is true that that's the way the schedules as prepared by debtor's counsel read, but it is equally true that the notice to creditors reflects that the clerk of the Court, based on the way the matrix was prepared by debtor's counsel, did not or felt they were not able to mail it to the individuals. And the notice to creditors, Affidavit of service attached

thereto as Exhibit D-3 in evidence reflects that. Now, it does show on the first page of the proof of service as part of D-3 that a mailing did go to something known *[49] as Sturbridge Office Park, Suite 1203. But again, no law firm, no attorney in that law firm is noted.

Mr. Cooper (sic) for the debtor argues strenuously well, at the very least, the notice would have been dropped on someone's -- when the mail came in on a certain date, it would have been there as -- I guess like occupant mail he would argue. But I don't find that that is effective service. After all, the clerk acts based on the schedules prepared by the debtor, and the schedules prepared by the debtor, D-4, were not pristine and clear on this point.

It's also argued in this reconsideration motion by Mr. Markwardt for the complainants whose claim is sought to be barred that there's no mystery as to the addresses of his clients. These are the people that bought a car wash operation from Mr. Hamer years before the bankruptcy and that business transaction in the late 1980's when the debtor sells a car wash to Mr. Markwardt's clients results in a long series of lawsuits, several lawsuits, venue motions, all reflected in the argument before on September 8th and the pleadings filed in support of the various motions at that time. And all of that litigation had stretched on for a year or two in the State Court, was pending, and it was on the eve of actions in that State Court lawsuit that Mr. Hamer was driven to file this bankruptcy to seek protection. So when he files his schedules with the clerk of the Bankruptcy Court, D-4, on November 3rd,

*[58] individuals, and that that confusion was brought out by the debtor in the way the paperwork was filed that the Clerk of the Court relies on. That's point one.

But if that was the only issue, I had found in Poskanzer that actual notice is enough. As Judge Wollin, in reciting the facts in Poskanzer and affirming my bar date decision in that, that's 146 B.R. 125, Judge Wollin notes that there was actual notice in Poskanzer and they attended the creditor's meeting.

Well, we have that in this case, so if there was only that issue, it's conceded that the Movsesian counsel was at the creditor's meeting, they might fail.

But then we move on to the allegation about the Court had moved a year or 14 months before the bar date, the secretary makes a mistake, wherever she gets the address from is really immaterial and although I note as a footnote, the Lawyer's Diary throughout the whole year of 1993 after we've already moved tells everybody that we're still in the old building.

For whatever reason, the secretary makes a mistake, types the wrong address, gives to a verified or a normal commercial delivery company, they come here on a Friday, for whatever reason didn't deliver the papers, the Court's not in the building. The next day, they correct the situation, they come over to the correct building at 9:30 in the morning and file the papers. ***[59]**

Again, if that was the only issue if that was the only thing the plaintiff stood on, I think I would have ruled the other way.

The third point, the removal of the matters by the debtor himself, in other words, the -- it's a Complaint pending, it's not a collection suit in the State Court pre-bankruptcy. It's not a breach of contract suit, it's a fraud suit.

These plaintiffs are suing this debtor for years in the State Court claiming fraud. Before the bar dates expires, this debtor drags those suits for what-ever tactical reason into the District Court, within the parameters of the bar date. The sum total of those three equitable arguments convinced me that it would be a grave miscarriage of justice to allow Mr. Hammer who starts out with an improper matrix, in my opinion. Counsel argues that the matrix meets the standard.

But when you look in Exhibit D-4 at the matrix, which is toward the rear of the exhibit, the -- the address it's almost inconceivable that anyone -- forget computers -- the address that he would have had us read here; according to the matrix is Berdj Movsesian, Andrienne Movsesian, Noubar Mahdessian,

Appendix B

Ann Mahdessian, Berdj & Noubar Corporation, A & N, Inc., care of Markwardt and Katkocin, Sturbridge Office Park, Suite 1203, 180 Route 73, North Voorhees, New Jersey 08043-9505. That's a 11 line address in addressing all those *[60] parties.

I find that it is not surprising, having created that type of a matrix, that there was a foul-up in the mailing by the Clerk of the Court, particularly in view of the fact that at that point it was conceded in argument today no appearance had been filed in the bankruptcy for the individuals as argued by Mr. Markwardt that the address of his clients, the individual addresses were well-known. All of that taints the argument about the mailing that the debtor makes and supports the argument that the plaintiffs make that the mis-mailing is one of the things that created the problem here in that they never received the actual notice and the actual bar date. Admittedly, they knew about the bankruptcy, they had gotten a phone call. Admittedly, they showed up at the 341. But the record is barren of any proof of service of the bar date on the plaintiffs.

Second, we get the mistake in mailing that I -- I reviewed. And I've reviewed that and I think based on Pioneer it does rise to the level of excusable neglect. Now when I make that determination I note that the majority opinion in Pioneer requests or requires that certain findings have to be made by the trier of fact if excusable neglect is to be found. And the Supreme Court in Pioneer talks about the so-called Dix, D I X, test that's arising out of In re Dix 95 B.R. 134 Ninth Circuit Opinion from 1988, the Bankruptcy Appellate panel, a